

# VOLUME | OF |

COURT OF CRIMINAL APPEALS NO. CR-04-0183

## APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF Montgomery COUNTY, ALABAMA

CIRCUIT COURT NO. CC 02-920.60

CIRCUIT JUDGE Hobbs

Type of Conviction / Order Appealed From: Supplemental

Sentence Imposed:

Defendant Indigent:  YES  NO

CHARLES Smith A.I.S.# 129560

(Appellant's Attorney) (Telephone No.)

P.O. Box 1107

(Address)

ELMORE

(City)

AL

(State)

36025

(Zip Code)

CHARLES Smith

NAME OF APPELLANT

V.

STATE OF ALABAMA

(State represented by Attorney General)

NOTE: If municipal appeal, indicate above, and enter name and address of municipal attorney below.

NAME OF APPELLEE

Supplemental  
(For Court of Criminal Appeals Use Only)

F

**INDEX**  
**CLERK'S RECORD**

|  |     |
|--|-----|
| CASE ACTION SUMMARY.....   | 1-2 |
| MOTION TO CORRECT THE RECORD.....  | 3   |
| PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION FOR<br>SUMMARY DISMISSAL..... | 4-8 |
| CERTIFICATE OF COMPLETION.....   | 9   |

ACRO370  
COURT: TOR  
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CASE ACTION SUMMARY  
CIRCUIT CRIMINAL

CASE: CC 2002 000920.60

RUN DATE: 04/13/2004

IN THE CIRCUIT COURT OF MONTGOMERY

STATE OF ALABAMA

CASE: CC 2002 000920.60

VS SMITH CHARLES  
AIS#121560 2-CELL-169  
P.O.BOX 1107  
ELMORE, AL 36025 0000DOB: 01/31/1958 SEX: M RACE: B HT: 5 08 WT: 210 HR: BLK EYES: BRO  
SSN: 419886398 ALIAS NAMES:CHARGE01: RULE 32-FELONY  
OFFENSE DATE: 04/28/2002CODE01: RULE LIT: RULE 32-FELONY TYP: F #: 001  
AGENCY/OFFICER: 0030100DATE WAR/CAP ISS:  
DATE INDICTED:  
DATE RELEASED:  
BOND AMOUNT: \$200,000.00DATE ARRESTED: 04/28/2002  
DATE FILED: 04/07/2004  
DATE HEARING:  
SURETIES:DATE 1: DESC:  
DATE 2: DESC:  
TIME: 0000  
TIME: 0000

TRACKING NOS: CC 2002 000920 00 /

DEF/ATY:

TYPE:

TYPE:

00000

00000

PROSECUTOR:

USE: CC200200092000 CHK/TICKET NO:  
COURT REPORTER: SID NO: 000775002 GRAND JURY:  
DEF STATUS: PRISON DEMAND: OPER: TOR

| TRANS DATE | ACTIONS, JUDGEMENTS, AND NOTES                | OPE    |     |
|------------|---|--------|-----|
| 04/13/2004 | ASSIGNED TO: (TMH) TRUMAN M HOBBS             | (AR01) | TOR |
| 04/13/2004 | CHARGE 01: RULE 32-FELONY/#CNTS: 001          | (AR01) | TOR |
| 04/13/2004 | BOND SET AT: \$200000.00                      | (AR01) | TOR |
| 04/13/2004 | DEFENDANT ARRESTED ON: 04/28/2002             | (AR01) | TOR |
| 04/13/2004 | FILED ON: 04/07/2004                          | (AR01) | TOR |
| 04/13/2004 | INITIAL STATUS SET TO: "P" - PRISON           | (AR01) | TOR |
| 04/13/2004 | CASE ACTION SUMMARY PRINTED                   | (AR08) | TOR |
| 04/13/2004 | CAS ATTACHMENT PRINTED                        | (AR08) | TOR |
| 4-13-04    | Copy to DA                                    |        |     |
| 4-14-04    | Order giving State 30 days to Respond         |        |     |
| 4-15-04    | Order Dismissing Rule 32                      |        |     |
| 104        | Notice Of Appeal w/ Forms                     |        |     |
| 129/04     | Cert. of Appeal to Crim. Appls, AG, DA & Def. |        |     |
| 122/04     | Transcript Request                            |        |     |

## ACRO369 ALABAMA JUDICIAL INFORMATION CENTER

CASE ACTION SUMMARY  
CONTINUATIONCASE: CC 2002 000920.60  
JUDGE ID: TMH

STATE OF ALABAMA

VS SMITH CHARLES

DATE

ACTION, JUDGMENTS, CASE NOTES

12/10/04 motion to correct the record

*ALL*  
CR-04-0183" IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CHARLES SMITH,

Appellant,

VS

STATE OF ALABAMA,

Appellee.

MOTION TO CORRECT THE RECORD

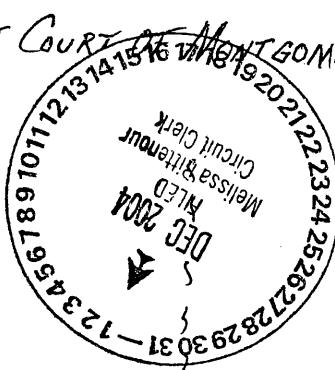
Comes Now the Appellant in the above-styled cause, pro se, and respectfully Move the Clerk to supplement and/or correct the record pursuant to Rule 10(g), A.R.App.P. Base on the following:

1. Appellant filed Opposition to State's Response to his Rule 32 petition;
2. Opposition is incorrectly omitted from Record on appeal, and material to issues on Appeal.

Respectfully submitted this 30th day of November, 2005.

*Charles Smith*

cc: Lane W. Mann, Clerk  
Court of Criminal Appeals



Case No. CC-02-920-60

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA  
FIFTEENTH JUDICIAL CIRCUIT

CHARLES SMITH,

Petitioner,

vs.

STATE OF ALABAMA,

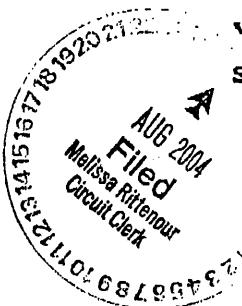
Respondent,

) Case No. CC-02-920.60 TMH

PETITIONER'S OPPOSITION TO  
RESPONDENT'S MOTION FOR SUMMARY DISMISSAL

COMES NOW the Petitioner in the above-styled cause,  
(hereinafter "Smith") -pro se-, in the following manner:

1. Smith's claims for post-conviction relief may not be summarily dismissed at the initial pleading stage. *Johnson v. State*, 586 So.2d 1077 (Ala.Cr.App.2001). Smith must only provide clear and specific statement of grounds upon which upon which relief is sought, and once Smith has met his burden of pleading, he is then entitled to an opportunity to present evidence in order to satisfy his burden of proof. Rule 32.1, A.R.Cr.P., et seq *Johnson Id.*
2. The Respondent alleges in their Motion to Dismiss that: [Smith's] claim of: "*The Trial Court erred by denying the Petitioner's two oral motions seeking a judgment of acquittal during trial*" is precluded pursuant to rule 32.2(a)(4), as evidence of this the Respondent referred a Memorandum Opinion from the Alabama Court of Criminal Appeal. Smith agrees that claim appear to be precluded.
3. The Respondent alleges in their Motion To Dismiss that [Smith's] claim of: "*The trial Court erred in denying*



the Petitioner's motion for new counsel and for a continuance thus depriving him of effective assistance of trial counsel", is precluded also pursuant to Rule 32.2(a)(4), and also supported by Memorandum Opinion *Id.*

4. The Respondent alleges further that Smith's claim of: "The indictment was fatally flawed on its face, thus depriving the court of jurisdiction to render judgment and impose sentence". . . fail to raise any disputed issue of material fact or law that would entitle [Smith] to relief; therefore, these claims are due to be denied and the petition summarily dismissed. The Respondent preferred the arrest Warrant in this case, as evidence, and this argument must fail. The State did not meet its burden of proving that the person named in the indictment as being the victim of the offense was, in fact, the victim. *Sockwell v. State*, 675 So.2d 4, 21 (Ala.Cr.App.1993).

"[A] variance [as alleged by Smith in his petition] between name of the victim of armed robbery alleged in indictment and name of victim proved at trial was fatal rendering [Smith's] conviction void, where robbery as charged was crime against the person rather than property offense, and inclusion in indictment of establishment as owner of property stolen thus did not cure variance". See Section 13A-8-41, 13A-8-43 Code 1975; *Ex parte Verzone*, 868 So.2d 399 (Ala. 2003). This claim is meritorious on its face, *id.*, and it not precluded. *Wilson v. State* 582 So.2d

582 So.2d 588 (Ala.Cr.App.1991). There is no sound legal strategy for counsel's failure to object to the indictment fatally defective, exposing Smith to danger of a second trial on the same charge, by Arby's or even person listed as the Complainant in the Complaint, Affidavit, and Warrant of Arrest, i.e., Zannetta Roberson in this case. *Ex parte A.T.M.*, 804 So.2d 171, 173 (Ala. 2000).

5. The respondents alleged that Smith's claim of: "*The Trial Court erred in sentencing the defendant under the Habitual Felony Offender Act*". "[F]ails to raise any disputed issue of material fact or law that would entitle the Petitioner to relief, therefore, these claims are due to be denied and the petition summarily dismissed." The Respondent's Answer to this claim is nonresponsive. Causing Smith's claim here to be unrefuted, in that, absence of notice to Smith, before sentencing hearing, of prior conviction on which state would proceed under under the Habitual Felony Offender Act. *Moore v. State*, 839 So.2d 530 (Ala.Cr.App.1998). Furthermore, Smith's claim is jurisdictional, because "Smith claim sentence exceeded the maximum allowed by statute.

6. Smith further contends and realleges all of the allegations raised in his petition as if set out in full. That counsel's conduct (conflicting interest) deprived him of several available grounds of defense, i.e., the state's suppression of requested evidence (video tape showing the alleged 100 miles per hour chase) favorable to him, in

7

violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). (R-237) without "knowledge" or an "objection" from counsel. The failure to disclose the evidence totally prevented Smith's counsel from preparing portions of the defense. Here, however, counsel on the day of trial did not have any facts of the case in his file, and only wanted to withdraw, but Order to continue (R-6-7).

The inadequacy of defense counsel's pretrial investigation may rise to level of a violation of [Smith's] Sixth Amendment right to the effective assistance of counsel regardless of the standard for evaluating ineffectiveness claims. *Robert v. Wainwright*, 666 F.2d 517 (11th Cir. 1982); *Taylor v. State*, 291 Ala. 756, 287 So.2d 901, and satisfies the first prong of the Strickland test. *Aldrich v. Wainwright*, 777 F.2d 630 (11th Cir. 1985).

7. Smith submits that the cumulative effect of the errors complained of above prejudiced him and were so serious when taken together that counsel was not functioning as COUNSEL guaranteed by the Sixth Amendment. *Strickland v. Washington*, \_\_\_\_ U.S.\_\_\_\_, 104 S.Ct.2052, 80 L.Ed. 2d 674 (1984).

8. Smith concludes that counsel's failure to provide effective assistance of counsel in the trial court, and made a sham and mockery of the proceedings and deprived him of his rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Const., as well as those

guaranteed to him by Art. I Section 6 of the Constitution of the State of Alabama .

9. The fact alleged mandate that, pursuant to the provisions of Rule 32 A.R.Cr.P., that Smith's conviction and sentence be vacated and that he be afforded a new trial and/or sentencing proceeding.

WHEREFORE THE PREMISES CONSIDERED, Charles Smith  
prays that this Honorable Court grant him an evidentiary  
hearing on the matters herein, and any and all other relief  
he may show himself entitled.

THIS 19<sup>th</sup> DAY OF August 2004.

Respectfully submitted,

Charles Smith  
Charles Smith, #129560  
P.O. Box 1107  
Elmore, AL 36025

ORDER

The Court hereby set the foregoing motion for a hearing  
on the \_\_\_\_ day of \_\_\_\_\_. 2004, at \_\_\_\_o'clock, \_\_\_\_M.

\_\_\_\_\_  
CIRCUIT JUDGE

|  |            |   |                                |
|--|------------|---|--------------------------------|
| State of Alabama<br>Unified Judicial System<br><br>ARAP-14           | Rev. 11/91 | <b>CERTIFICATE OF COMPLETION AND<br/>TRANSMITTAL OF RECORD ON<br/>APPEAL BY TRIAL CLERK</b> | Appellate Case Number<br>_____ |
| <b>TO: THE CLERK OF<br/>THE COURT OF CRIMINAL APPEALS OF ALABAMA</b> |            | <b>DATE OF<br/>NOTICE OF APPEAL:</b>  | 10/13/04                       |
| <b>APPELLANT</b>   |            |   |                                |
| CHARLES Smith  |            |   |                                |
| v. STATE OF ALABAMA  |            |   |                                |

I certify that I have this date completed and transmitted herewith to the appellate court the record on appeal by assembling in (a single volume of \_\_\_\_\_ pages) (\_\_\_\_\_ volumes of 200 pages each and one volume of \_\_\_\_\_ pages) the clerk's record and the reporter's transcript and that one copy each of the record on appeal has been served on the defendant and the Attorney General of the State of Alabama for the preparation of briefs.

I certify that a copy of this certificate has this date been served on counsel for each party to the appeal.

DATED this 9th day of DEC, 2004.

Melissa Rittenour  
Circuit Clerk